NAI NINN SARARAKSH v. FIVE STAR HERITAGE SDN BHD & ORS AND OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
ABU BAKAR JAIS JCA
AHMAD ZAIDI IBRAHIM JCA
[CIVIL APPEAL NOS: P01(A)-602-10-2021, P01(A)-609-10-2021 & P01(A)-621-10-2021]
17 APRIL 2023

Abstract – *The Attorney General ('AG') of Malaysia is the parens patriae, the custodian of all public charitable trusts and where there are issues relating to a public charitable trust, enquiries can be made to the AG as the parens patriae. The AG is seized with the authority to grant consent to proceed with a certain action concerning a public charitable trust.*

ADMINISTRATIVE LAW: *Judicial review – Appeal against – Appeal against decision of High Court allowing application for judicial review – Public charitable trust – Indenture created in 1845 to declare land as public charitable trust for two communities – Land partitioned into two pieces with two separate titles – One portion of land further partitioned and subdivided into two pieces of land – New trustees transferred one of subdivided titles to developer – Court sanctioned development of trust property into commercial properties – Aggrieved parties obtained consent from Attorney General ('AG') to commence action – Whether AG correctly granted consent – Government Proceedings Act 1956, s. 9*

TRUSTS: *Land – Public charitable trust – Indenture created in 1845 to declare land as public charitable trust for two communities – Land partitioned into two pieces with two separate titles – One portion of land further partitioned and subdivided into two pieces of land – New trustees transferred one of subdivided titles to developer – Whether public charitable trust could stand test of time – Whether public charitable trust converted into private trust*

The three appeals herein arose from the decision of the High Court allowing an application for judicial review by the respondents. The respondents in all three appeals were the same while the appellants in each appeal were Nai Ninn Sararaksh, Ho Choon Theik ('Ho') and Attorney General of Malaysia ('AG'). In 1845, by a trust indenture, the British East India Company had established a public religious charitable trust for the Thai and Burmese communities of Penang ('1845 indenture'). The public religious charitable trust involved two parcels of land, namely Lot No. 2102 and Lot No. 2103, which were subdivided from an original Lot No. 104 pursuant to a court order dated 19 October 1994. This was despite the fact that the 1845 indenture had stated that no part or parcel of the Thai-Burmese trust land

shall be alienated and shall remain, continue and be for the benefit of the Thai and Burmese communities forever. The Thai trustees were registered as the owners of Lot No. 2102 while the Burmese trustees were registered as the owners of Lot. No 2103. The present dispute concerned only Lot No. 2103 and the Burmese trustees. There was a consent by the AG which confirmed (i) the named persons to be appointed as trustees for the Thai and Burmese trusts; and (ii) separate administration and division of the funds of the Thai and Burmese trusts. In 2006, the second to fifth respondents, who were Burmese trustees, executed a trust deed for purposes of managing and administering the trust property and trust funds which were to benefit only the Burmese community of Penang ('31 July 2006 trust deed'). It was declared that all that piece of land, together with the building erected thereon situated in Lot 2103 would be held on trust by them. The Burmese trustees entered into a joint venture agreement ('JVA') with a developer to develop Lot No. 2103. The Penang Burmese trustees obtained a court order declaring the JVA as validly entered into ('order dated 31 October 2007'). The court sanctioned the development of the Penang Burmese trust property into commercial properties under the JVA. The first respondent, Five Star Heritage Sdn Bhd ('Five Star'), was formed pursuant to the said court order as a corporate joint venture vehicle to undertake the development of the commercial properties with the Penang Burmese trust. In 2013, Lot No. 2103 was further subdivided into two plots, namely Lot No. 10029 and Lot No. 10030. Lot No. 10029 was registered in the name of Five Star while Lot No. 10030 was registered in the name of the Penang Burmese trustees *ie* the second to fifth respondents. *Vide* an originating summons ('OS 1128'), Nai and Ho applied to challenge, *inter alia*, the order dated 31 October 2007. Nai obtained the consent from the AG and was given the authority to obtain the orders, including declarations and injunctions sought in OS 1128. Nai contended that he had the right to occupy the land as a Thai-Burmese descendant and he was not a squatter or a trespasser. Ho, who was not a party to OS 1128 initially, intervened and was added as the second plaintiff. The AG granted consent, pursuant to s. 9 of the Government Proceedings Act 1956 ('GPA'), which allowed Nai and Ho to continue with the action in OS 1128 ('AG's consent dated 31 May 2016'). In OS 1128, the High Court (i) held that the sale of Lot No. 10029, which resulted in the lot to be registered in the name of Five Star, was unlawful, illegal, null and void and of no legal effect; and (ii) set aside the order dated 31 October 2007 on the basis that the court lacked the jurisdiction to grant the order and that the consent of the AG was not obtained. The judicial review application filed by the respondents, which was the subject of the present appeals, arose against the AG's consent dated 31 May 2016 *ie*, given to Nai and Ho to continue with the proceedings in respect of OS 1128. As the High Court had allowed the judicial review application and quashed the AG's consent dated 31 May 2016, OS 1128 and the reliefs granted thereunder became a nullity. The issues that arose were: (i) whether the AG granted the consent correctly for the matter to be decided by the court; (ii) whether the AG acted in bad faith

in granting the consent to Nai and Ho; (iii) whether it was legally wrong for the AG's consent to be given to Nai and Ho in respect of OS 1128; (iv) whether the AG considered the respondents' representation; (v) whether the 31 July 2006 trust deed could override the 1845 indenture; (vi) whether public charitable trust could stand the test of time; (vii) whether the public charitable trust had been converted into a private trust; (viii) whether it was relevant to note that the land had been rezoned for commercial; and (ix) whether separate management and administration for the initial trust meant that the public religious trust had turned into a private trust.

Held (allowing appeals; setting aside order of High Court)

Per Abu Bakar Jais JCA delivering the judgment of the court:

(1) The AG, by giving his consent for Nai and Ho to challenge the validity of the appointment of the new trustees and the transfer of the land by the new trustees to the first respondent was consistent with its consent in 2002 in agreeing to have the land granted by way of the 1845 indenture to be split into two portions, *ie*, one for the Thais while the other for the Burmese. It had everything to do with separate administration and management of each of their own affairs. The AG left the matter to the court to decide on whether the transfer of the land by the new trustees to the first respondent be impugned. He did not take sides other than to act consistent with its previous stand that it was a public trust and so, its consent was sought for this split. Not to give consent to the challenge would shut out the appellants (who were the plaintiffs in OS 1128) and would affect Nai's interest in the house, which was on the land. Hence, the AG's consent was correctly given to Nai and Ho. (paras 83 & 84)

(2) The AG's consent could not be said to have been given in bad faith. It was not so unreasonable a decision that no one in his right frame of mind would have given the said consent. The important thing was that he did not take any partisan stand on the issues but left it to the parties to persuade the court. The AG's decision to grant his consent under s. 9(1) of the GPA was not given *mala fide.* As the protector of public interest, he must act in a responsible manner to allow even a public-spirited citizen to come to court to air an important public grievance and here, in respect to what was said to be a public trust. The AG had taken relevant factors into consideration and he had not taken irrelevant factors into consideration. He had acted reasonably and responsibly in granting his consent. There was no good reason to review his decision and the High Court erred in quashing his decision to grant the consent. (para 85)

(3) There were serious issues that warranted the AG to give his consent to Nai and Ho. One such issue was the need to further probe how, why and when a charitable trust for religious purpose could be turned into a

purported private trust, no less with a commercial pursuit. The consent was not granted to Nai and Ho to serve their individual and personal interests at the expense of the Burmese community towards their religious needs. (paras 86 & 88)

(4) Prior to the AG granting the consent to Nai and Ho, the AG had considered the representation made by the respondents through their solicitors' letter. It was not true for the respondents to assert that the AG did not consider their views before the consent was granted. (para 90)

(5) There was basis to inquire whether the present Burmese trustees could have breached the terms of the 1845 indenture by transferring part of the trust property to the first respondent by allotting Lot No. 10029 to Five Star without obtaining the consent of the AG pursuant to s. 9 of the GPA. Thus, the AG's consent for Nai and Ho to pursue OS 1128 was a fair decision in seeking to understand how a public religious trust had turned into a private trust. (para 93)

(6) Compared to private trust, public charitable trust and its purpose could last for generations far beyond its initial establishment. In the present case, although the trust was first established in 1845 for religious purpose, that purpose could still be validly maintained to this date. (para 94)

(7) The court's declaration had been requested that the JVA between the trustees of the descendants of the Burmese in Penang and the developer was valid. However, the AG's consent was not obtained for this and this fact was not denied. Therefore, the HC was without authority and jurisdiction to make the order dated 31 October 2007. The public charitable trust for religious purpose for the Burmese community could not have changed to a private trust under this circumstance. The circuitous manner upon which the public trust had been vested for Five Star and the present Burmese trustees as private trusts should not go unnoticed in the present appeal (paras 95 & 96).

(8) The fact that part of the Burmese portion of the land had been rezoned for commercial use did not change the character of the public charitable trust for the advancement of religion. The planning authority's rezoning of land use cannot be used as a reason for arguing that the public charitable trust had failed. (para 98)

(9) The initial public religious trust for the Thai and Burmese communities were later separated for the two communities resulting in the partitioning of Lot 104 into Lot No. 2102 and Lot No. 2103. This was for pure administrative purpose and should not have affected the nature of the public trust and did not turn the same into a private trust. (para 99)

A **Legislation referred to:**
Government Proceedings Act 1956, s. 9(1)

For the Nai Ninn Sararaksh - Ravin Vello; M/s Vello & Assocs
For Five Star Heritage Sdn Bhd - Karin Lim Ai Ching, Julinder Sarjit Daliwal, Suppiah Arumugam & Alyssa Lim; M/s Aznil Naziah Juli & Praba
B *For the Attorney General - Shamsul Bolhassan, Mohammad Al-Saifi Hashim; SFCs & Nur Syazwani; FC*

[Editor's note: Appeal from High Court, Pulau Pinang; Judicial Review No: PA-2532-08-2016 (overruled).]

C *Reported by Lina E*

JUDGMENT

Abu Bakar Jais JCA:

Introduction

D

[1] There are three appeals before us. The first, Appeal No. P 01(A)- 602-10/2021 is between Nai Ninn Sararaksh ("Nai") as the appellant and Five Star Heritage Sdn Bhd and five others as the respondents ("Appeal No. 602"). The second is Appeal No. P 01(A)-609-10/2021 between Ho Choon Teik ("Ho") as the appellant and the same respondents ("Appeal E No. 609"). The third and last is Appeal No. P 01(A)-621-10/2021 between Attorney-General Malaysia ("AG") and also the same respondents ("Appeal No. 621").

[2] The three appeals arose from the decision of the High Court ("HC") F which had allowed an application for judicial review ("JR") filed by the respondents.

[3] Nai, Ho and AG all opposed that application for JR filed by the respondents at the HC. The application for JR is to challenge the AG's consent dated 31 May 2016 given to Nai and Ho to continue with the G proceedings in respect of an Originating Summons No. 24NCVC-1128-12-2014 ("OS 1128").

[4] Thus, the limited scope of the of the appeals must be borne in mind. It is only to challenge and question the said consent by the AG given in respect of OS 1128.

H

OS 1128

[5] There is a long history as backdrop to OS 1128. This must first be explained to better understand the dispute in the present appeals. The history takes us back to the middle of 19th century, Penang.

I

[6] On 30 May 1845, by a trust indenture, the British East India Company on behalf of Queen Victoria had established a public religious charitable trust for the Siamese or Thai and Burmese communities of Penang. The said

public religious charitable trust involved two parcels of land known as Lot 2102 and Lot No. 2103 which were subdivided from an original Lot No. 104 pursuant to a court order dated 19 October 1994. This is despite the fact that the 1845 trust indenture stated that no part or parcel of the Thai-Burmese trust land shall be alienated and shall remain, continue and be for the benefit of the Thai and Burmese communities forever.

[7] Subsequently, the Thai trustees were registered as the owners of Lot No. 2102 and the Burmese trustees were registered as the owners of Lot No. 2103 pursuant to the order of the court dated 3 October 2002.

[8] At the outset, for clarity, it should be pointed out the dispute in the present appeals does not involve the Thai trustees or Lot No. 2102. The dispute is only in respect of Lot 2103 and the Burmese trustees.

[9] There is a consent by the AG dated 1 June 2000 which had confirmed the following:

(i) named persons to be appointed as trustees for the Thai and Burmese trusts;

(ii) separate administration and division of the funds of the Thai and Burmese trusts.

[10] On 31 July 2006, the second to fifth respondents in the present appeals, as Burmese trustees, executed a trust deed for purposes of managing and administering the trust property and trust funds which are to benefit only the Burmese community of Penang. It was declared therein that all that piece of land together with the building erected thereon situated in the Burmese trust property (Lot 2103) will be held on trust by them.

[11] Thereafter, the Burmese trustees entered into a joint venture agreement (JVA) dated 25 August 2006 with Airmas Development Sdn Bhd to develop Lot No. 2103.

[12] On 31 October 2007, the Penang Burmese trustees obtained a court order which declared the JVA as validly entered into. It is to be noted that the Penang Burmese trust property has not been zoned exclusively for religious purpose. A part of it is zoned for commercial purpose. Hence, the court sanctioned the development of the Penang Burmese trust property into commercial properties under the JVA as reflected in the said order dated 31 October 2007.

[13] Five Star Heritage Sdn Bhd, the first respondent in the present appeals, was formed pursuant to the said court order dated 31 October 2007 as a corporate joint venture vehicle to undertake the development of the commercial properties with the Penang Burmese trust.

[14] In July 2013, Lot No. 2103 was further subdivided into two plots of land, namely Lot No. 10029 and Lot No. 10030. After the subdivision, Lot No. 10029 became registered in the name of the Five Star Heritage Sdn

Bhd, the first respondent and Lot No. 10030 was registered in the name of the Penang Burmese trustees *ie*, Hla Toon Toolseram, Maung Aung Thou, Moong Ba and Maung Ban Chowi, the second to fifth respondents.

[15] *Vide* OS 1128, Nai and Ho applied to challenge, amongst others, the said court order dated 31 October 2007 in respect of the transfer of lands known as Lot No. 10029 to the first respondent and Lot No. 10030 to the second to fifth respondents. Nai and Ho took the position that Lot No. 10029 and Lot No. 10030 are part of a public charitable trust.

[16] On 31 May 2016, Nai obtained the consent from the AG and was given the authority to obtain the orders, including declarations and injunction sought therein in OS 1128. Nai contended that he has the right to occupy the land as a Thai-Burmese descendant and he is not a squatter or a trespasser.

[17] The consent from AG was obtained about one and half years after OS 1128 was filed. And at the time the consent was given, Ho was not a party to OS 1128. Ho subsequently intervened in OS 1128 and was added as the second plaintiff. The AG granted the consent pursuant to s. 9 of the Government Proceedings Act 1956 ("GPA") which allowed Nai and Ho to continue with the action in OS 1128.

[18] The main relief requested for OS 1128 by Nai and Ho is for an order to set aside *ex debito justitiae* the registration of the first respondent as the owners of Lot 10029 and second to fifth respondents as owners of Lot 10030. This is on the ground of lack of jurisdiction and absence of consent from the AG under s. 9 of the GPA.

[19] The HC for OS 1128, *inter alia*, held that the sale of Lot No.10029 which resulted in the said lot to be registered in the name of Five Star Heritage Sdn Bhd, the first respondent is unlawful, illegal, null and void and of no legal effect.

[20] The HC also for OS 1128, had set aside the order of court dated 31 October 2007 on the basis that the court lacked the jurisdiction to grant the order and that the consent of the AG was not obtained. Further, the court also found that there exists a public religious charitable trust.

[21] Five Star Heritage Sdn Bhd, the first respondent and others appealed against the decision in OS 1128. On 16 April 2019, the parties consented to stay the said appeal pending the disposal of the JR.

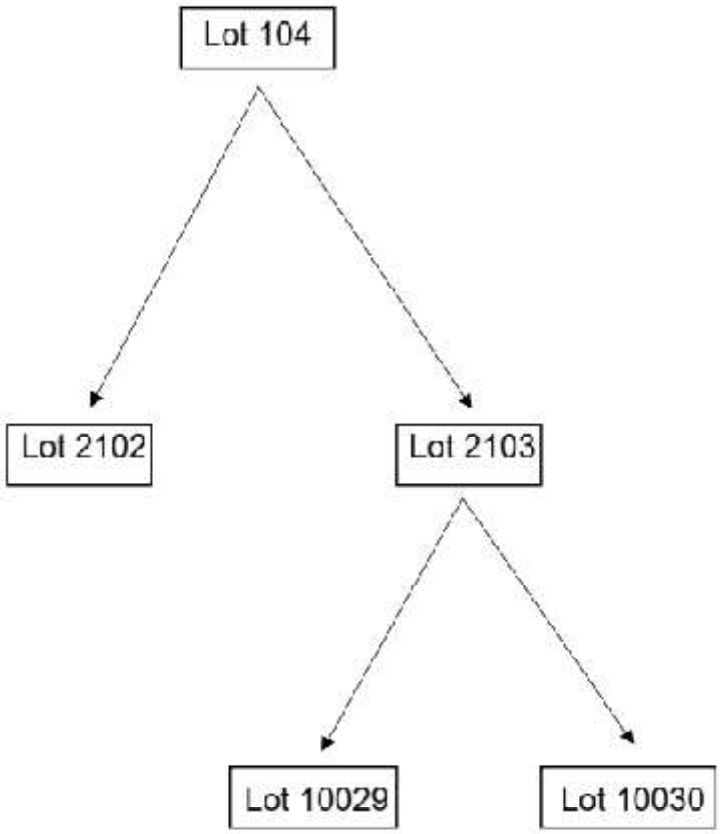
[22] With the disposal of the JR, we heard the appeal in respect of OS 1128 and unanimously dismissed the same. The written judgment of this appeal is by our learned brother, Lee Swee Seng JCA. This written judgment is comprehensive as the issues raised there were addressed in good measure by our learned brother. These issues also were raised in the present appeal. We shall allude to them in a short while. However, for consistency, it is obvious we should not depart from the findings in law and in fact already made by us and explained by our learned brother in that written grounds.

[23] Five Star Heritage Sdn Bhd, the first respondent in turn, had filed eviction proceedings in the Sessions Court against Nai who occupies and claims to be the owner of the premises known as No. 3, Burmah Lane ("the premises"). The premises is situated on Lot 10029 which is registered under the name of Five Star Heritage Sdn Bhd, the first respondent.

[24] Nai filed a counterclaim asserting that he has a right to occupy the premises based on the public charitable trust *ie*, the Thai-Burmese trust. Nai's claim is denied by Five Star Heritage Sdn Bhd. Nai also asserted that he need not surrender vacant possession of the premises to Five Star Heritage Sdn Bhd without the consent from the AG first being obtained.

[25] On 22 December 2015, the Sessions Court proceeding was transferred to the HC, which was then registered as Penang High Court Civil Suit No: PA-22NCVC-34-02/2016 ("Suit 34"). On 25 March 2019, Suit 34 was stayed upon the application of Five Star Heritage Sdn Bhd, the first respondent pending the disposal of the application for the JR.

The Diagram Of The Division Of The Lots



[26] The diagram above of the division of the original plot of land should be of assistance in understanding OS 1128, bearing in mind the overall facts of the case.

The JR Application

[27] The JR application filed by the respondents, which is the subject of the present appeals, arose against that consent by the AG dated 31 May 2016 given to Nai and Ho to continue with the proceedings in respect of OS 1128. Dissatisfied with this consent, the first respondent and the four others had filed the above-mentioned application for the JR. The substantive JR was eventually heard by the HC and the same allowed the JR application and quashed the AG's consent dated 31 May 2016. With the quashing of that consent, OS 1128 and the reliefs granted thereunder, became a nullity.

Summary Of The HC's Decision Regarding The JR

[28] The learned HC Judge ("HCJ") for the JR allowed the same based on the followings.

[29] There is no temple on the land managed by the Burmese trustees. The temple is on the land managed by the Thai trustees (Lot 2102). There is no charitable purpose for the Burmese community in Lot 2103 and its further division into Lot 10029 and Lot 10030. There are no public donations for the lands held by the Burmese trustees as opposed to the land held by the Thai trustees.

[30] It is incorrect to say that the division of the original Lot 104 into Lot 2102 and Lot 2103 for the Thai and Burmese community respectively was only to ease the administration of the religious charitable purpose of Lot 104 for the two different communities.

[31] In fact, for the Burmese trustees, the land held by them has been zoned partly for commercial purpose and not exclusively religious.

[32] The original religious purpose for Lot 104 under the 1845 trust indenture had been varied. It is no longer a public charitable trust. The Burmese trust had become a private trust. It would have remained a public trust had Lot 104 been not divided for the Thai trustees for Lot 2102 and the Burmese trustees for Lot 2103.

[33] There is already a consent by the AG dated 1 June 2000 which allowed for named persons as trustees for the separate Thai and Burmese trusts and separate funds for the same. This consent did not stipulate the charitable religious trust is to be continued. Further, this consent is still good and valid as it has not been set aside.

[34] The beneficiaries of the present trust. It is also ascertainable for it to be considered as a private trust. It has been established for the Burmese community in Penang and not just any member of the public. It is only for

one community and its members could be ascertained. Since it is for the Burmese community in Penang, it does not satisfy the general charitable intention or public benefit criterion of a public charitable trust.

[35] In the case of the Penang Burmese trust, the public element is missing. Someone who is not a Burmese and not from Penang cannot come within the purview of this trust. Therefore, it cannot be a public charitable trust.

[36] Therefore, the present respondents (the applicants in the JR) do not require the consent of the AG under s. 9 of the GPA to obtain declarations in relation to the development of the Penang Burmese trust's property and the appointment of the trustees of the Penang Burmese trust. There were also continuing surviving trustees to appoint new trustees.

[37] Though the trust deed referred to the 1984 trust indenture, it was not incorporated into the trust deed.

[38] The holding of Lot 10029 now under the name of the first respondent does not require the consent of the AG under s. 9 of the GPA as the Penang Burmese trust is now a private trust and not a public trust. Therefore, how the first respondent became registered as owner of Lot 10029 is irrelevant.

[39] Besides, there are court orders still subsisting and valid to denote the private nature of the trust. These court orders cannot be set aside without all relevant parties being present in court. The respondents (applicants in the JR), therefore could challenge the AG's consent given to Nai and Ho in the present appeals before us to proceed with OS 1128.

[40] Nai and Ho are not Burmese to question the Penang Burmese trustees.

[41] The AG must apply to become a party for OS 1128 to challenge the private trust and not delegate his power to Nai and Ho for this purpose. The AG is in breach of his public duty to delegate his power to Nai and Ho.

[42] The original Thai-Burmese Trust has not filed for *cy-pres* order to be applied. *Cy-pres* order is not needed to modify the scheme of the trust. The first consent by the AG has already been given to separate this trust to two. One for the Thai community (held by Penang Thai trustees) and the other for the Burmese community (held by Penang Burmese trustees).

[43] The issues raised here need not be raised in the appeal against the decision given for OS 1128. The consent by the AG to Nai and Ho to pursue OS 1128 can be raised in the JR as the rights of the respondents had been affected.

[44] Nai and Ho are not Burmese and therefore should not be given the AG's consent to pursue OS 1128. The consent should not have clothed them with authority to proceed with OS 1128.

[45] The crux of the dispute in the JR is the AG's consent to Nai and Ho for OS 1128. Therefore, the principle of *res judicata* does not apply in the JR even when there is already OS 1128. Further, as OS 1128 is under appeal, *res judicata* does not apply.

[46] The JR is not a collateral attack against OS 1128 although the consent of the AG for OS 1128 had been raised and decided when Ho applied to intervene in OS 1128.

[47] Ho is a member of Penang Myanmar Buddhist Association but not related to Penang Burmese trust. Nai and Ho are not members of the Penang Burmese Society. The AG did not refer to the members list of Penang Burmese trust before issuing the consent. The AG had not taken the interest of Burmese descent when the consent was given.

[48] The AG did not seek the views of the second to fifth respondents being trustees of Burmese trust and the sixth respondent as Chairman of the Penang Burmese Society before issuing the consent for Nai and Ho to pursue OS 1128. There was also no reply by the AG to the letter sent by the respondents. There is a breach of the right to be heard exercised by the AG against the respondents.

[49] There is a delay in instituting OS 1128 as Nai being a Thai, would have known of the partition of the original Lot 104 into Lot 2102 and 2103. In respect of Lot 10029, Five Star Heritage Sdn Bhd, the first respondent could evict Nai from the land as it has indefeasibility of title to the same.

[50] OS 1128 was commenced without the consent of the AG. The consent was only granted in the midst of proceeding of the same. This consent is invalid as it cannot be applied retrospectively.

Summary Of The Appellants' Contentions

[51] Before us, the collective submissions of the appellants can be summarised as follows.

[52] The respondents have failed to show that the AG had acted in an unreasonable manner in granting the consent dated 31 May 2016 for Nai and Ho to proceed with OS 1128.

[53] The land initially given for a public purpose (Lot 104) and held as public trust in this case cannot be turned to lands meant for private purpose held as private trust (materially Lot 2013, then Lot 10029 and Lot 10030). Likewise, funds obtained from donations by the public cannot be taken away and declared to be for private purposes and parties.

[54] The court orders which divided the subject lands and trust funds were only to ease the administration and management of the trust between the respective Thai and Burmese communities.

[55] The Burmese community which refers to a section of the community constitutes a class of the public. Thus, a trust in existence for such a community is a public charitable trust. It is completely clear that this trust is not confined to a sphere of private individuals.

[56] A religious public charitable trust exists in perpetuity and as such does not cease to exist due to any change in the way the religious public charitable trust is administered and managed.

[57] There could not be a private trust for the Burmese community as it is uncertain and impossible to ascertain each and every individual who would form that community for that private trust.

[58] The court order dated 31 October 2007 obtained by the Penang Burmese trustees for the development of Lot 2103 is referred to as for the "benefit of the Burmese Community in Penang". It is also pertinent to note that in the trust deed dated 31 July 2006 uses the term "Burmese community in Penang". Therefore, if the trust is for the benefit of a community, it naturally follows that it is a public charitable.

[59] The AG is the *parens patriae*; custodian of all public charitable trusts and where there are issues relating to a public charitable trust, enquiries can be made to the AG as the *parens patriae*. The AG therefore has the authority to grant the consent to Nai and Ho to proceed with OS 1128 as the AG is a custodian of public charitable trusts.

[60] The JR is purely academic in nature as the court had already decided the matters in OS 1128. Hence, by bringing forth this JR proceedings to decide on matters which have already been decided earlier, the respondents are abusing the court process.

[61] The respondents' re-litigation of matters which have been decided in OS 1128 is also not consistent with the doctrine of *res judicata*.

[62] The respondents also could not prove that the AG acted unreasonably in granting consent to Nai and Ho to proceed with OS 1128.

Summary Of The Respondents' Contentions

[63] The consent given by the AG on 31 May 2016 for Nai and Ho to proceed with OS 1128 could be challenged in the JR. That consent is reviewable by the court. The consent given also wrongly did not take into account the consent already given by AG on 1 June 2000.

[64] The AG should have been aware that from 1994 until 2007 there were court orders still applicable and binding. The consent given by AG on 31 May 2016 has the effect of challenging earlier court orders including the order to partition Lot 104 and these court orders have not been set aside at all.

[65] The *cy-pres* doctrine does not apply because the first consent by AG allows for the Thai-Burmese trust to be divided into two separate, distinct administration, management and accounts trusts for the Thai trustees and Burmese trustees.

[66] The learned HCJ for the JR gave cogent reasons for his finding of facts. He is not plainly wrong in this regard.

[67] The trust funds were legally divided between Burmese trustees and the Thai trustees by the court order dated 3 October 2002.

[68] Nai is of Thai descent and therefore had no *locus standi* to be given the consent by the AG to challenge the Burmese trust. While Ho has no *locus standi* as he is not Burmese but Chinese. The AG heard Nai and Ho when they applied for the consent even when they do not have the *locus standi*. However, the respondents were not heard by the AG when they are the ones having the *locus standi*. The Thai trustees too were not heard by the AG on the issue whether they would agree that the Burmese trust be reverted to public trust with the Thai trust, having been separated by the court order in 1994 issued earlier.

[69] The land vested in the Thai trustees has a Siamese temple. There is no temple on the land vested in the Burmese trustees. Therefore, there is no religious element for the land held by the Burmese trustees. The funds collected by the Thai trustees for the temple are not shared with the Burmese trustees.

[70] The land vested in the Burmese trustees is not zoned for religious but commercial purpose.

[71] The court had already ordered the partition of Lot 104 into Lots 2102 and 2103. This and the division of the trust funds are sanctioned by the consent of the AG on 1 June 2000. By this consent, the initial religious charitable trust had been terminated. This is confirmed by the court orders dated 19 October 1994 and 3 October 2002. There would not have been these orders if the courts did not agree to the partition of the land and the division of the trust funds. The land vested in the Burmese trustees after the partition of Lot 104 means that the same is no longer a public trust but has turned into a private trust.

[72] The first respondent was formed as a joint venture with the Burmese trust for commercial development to generate income for the Burmese community in view of the partition and divisions of the lands and the division of the trust funds.

[73] Pursuant to s. 9 of the GPA, the consent given by the AG to Nai and Ho must be granted before the commencement of OS 1128. This was not done and the consent was only given in the midst of the hearing of OS 1128. This consent is to continue OS 1128 but not to commence the same. The consent cannot be construed to be given retrospectively.

[74] The consent granted by the AG to Nai and Ho for OS 1128 did not consider the effect of previous court orders which have not been set aside and still binding. The AG acted arbitrarily in giving the consent. The consent is unreasonable in failing to appreciate the full facts and position of the Burmese trust. In light of the facts, the consent is illegal, a breach of duty by the AG and contravened s. 9 of the GPA.

[75] Nai and Ho who both had no *locus standi* had been given wide power and authority to question the Penang Burmese trust property.

[76] There is delay, laches, and acquiescence by Nai in approaching the court. He should not be allowed to challenge now as he did not challenge the partition of the trust property and the division of the funds. The second to fifth respondents were not given the right to comment and they were not consulted before the AG granted the consent to Nai and Ho. Further, the Penang Burmese Society should have been consulted before the AG granted the consent.

[77] The AG should apply to be a party in OS 1128, instead of delegating his power to Nai and Ho to pursue the reliefs sought for OS 1128.

Our Decision

[78] It is important to be reminded of the limited scope of the appeals. It is as explained to challenge the decision of the HC which granted the JR to the respondents against the consent by the AG given to Nai and Ho to obtain reliefs in respect of OS 1128.

[79] It is also most relevant to note, as earlier indicated that our learned brother Lee Swee Seng JCA has written the grounds of judgment in the appeal of OS 1128 involving similar facts and issues to the present appeals. As also indicated, it should be plain, for the sake of consistency, we should not depart from the findings in law and in fact already made by our learned brother, who sat with us for the appeal of OS 1128 and where we unanimously agreed to dismiss the same. We are indeed greatly assisted by the written grounds of our learned brother Lee Swee Seng JCA in OS 1128 in assisting us in turn to explain our reasons in disposing the present appeals.

[80] The issues that are relevant in the appeal of OS 1128 and intertwined with the present appeals are as listed below.

Whether The AG Granted The Consent Correctly For The Matter To Be Decided By The Court

[81] The JR which the HC allowed was with respect to the AG consenting to Nai continuing with his OS 1128 and in Ho's case to be added as a co-plaintiff with respect to the reliefs prayed for there. They sought the AG's consent because they took the view that the public charitable and religious trust created by an indenture of 1845 created a public trust for the Thai and

Burmese community in Penang which public purpose and public trust continue even after the split of the land into the Thai portion and the Burmese portion.

[82] The 1994 order and 2002 order do not convert the public trust into a private trust. The AG, by giving his consent for Nai and Ho to challenge the validity of the appointment of the new trustees and the transfer of the land by the new trustees to first respondent was consistent with its consent of 2002 in agreeing to have the land granted by Queen Victoria to be split into two portions (one the Thai and the other the Burmese portion). It has everything to do with separate administration and management of each of their own affairs.

[83] The AG leaves the matter to the court to decide on whether the transfer of the land by the new trustees to the first respondent should be impugned. He did not take any sides other than to act consistent with its previous stand that it was a public trust and so its consent was sought for this split. Not to give consent to the challenge would shut out the appellants who were plaintiffs in OS 1128 and it would affect Nai's interest in the house, which is on the land.

[84] Hence, we are of the considered view that the AG consent was correctly given to Nai and Ho.

Whether The AG Acted In Bad Faith In Granting The Consent To Nai And Ho

[85] Nai may be of Thai origin, but it cannot be denied that the house he has been in possession of is in the Burmese portion of the land that has been split. It was so recognised by the first respondent in their suit against Nai. As for Ho, he is a life member of the Penang Myanmar Buddhist Community Association whose condition of membership includes the requirement of being of Burmese descent. We are satisfied he is not a busybody but someone interested in the welfare of the Burmese community. We cannot say that the AG's consent was given in bad faith or that it was so unreasonable a decision that no one in his right frame of mind would have given the said consent. The important thing is that he did not take any partisan stand on the issues, but left it to the parties to persuade the court. We do not think that his decision to grant his consent under the s. 9(1) of the Government Proceedings Act 1956 was given *mala fide* and much less that he has an axe to grind with anyone being a protector of public interest, he must act in a responsible manner to allow even a public spirited citizen to come to court to air an important public grievance, and here it is in respect to what is said to be a public trust. We are satisfied that the AG has taken relevant factors into consideration and he has not taken irrelevant factors into consideration and

that he had acted reasonably and responsibly in granting his consent. There is no good reason to review his decision and we find that the HC had erred in quashing his decision to grant the consent.

Whether It Was Legally Wrong For The AG's Consent To Be Given To Nai And Ho In Respect Of OS 1128

[86] There are serious issues that warranted the AG to give his consent to Nai and Ho. One such issue is the need to further probe how, why and when that a charitable trust for religious purpose could be turned into a purported private trust, no less with a commercial pursuit.

[87] Nai who had his premises on a land held for religious purpose also should be given that consent by the AG to question the lawful authority for the first respondent that he vacates the land in favour of the first respondent.

[88] The consent given by the AG is only to further assist in understanding why and how a religious public trust could have been turned for a commercial purpose. It is not granted to Nai and Ho to serve their individual and personal interests at the expense of the Burmese community towards their religious needs.

[89] In this regard, we fully agree with our learned brother, Lee Swee Seng JCA where in the appeal for OS 1128, it is said as follows:

> All that the AG allowed by his written consent is for Nai Ninn to ventilate his claim and for the Court to decide without taking side on the issue of the final outcome. We could not see how such a decision vested in him under s. 9 of the GPA could be said to have been given unreasonably or irrationally such that no right thinking decision-maker would have given his consent.

Whether The AG Considered The Respondents' Representation

[90] In the appeal for OS 1128, we were of the finding that prior to the AG granting the consent to Nai and Ho, the AG had also considered the representation made by the respondents through their solicitors' letter dated 19 October 2015. Thus, it is not true for the respondents to assert that AG did not consider their views before the consent was granted.

[91] In any event in giving his consent, the AG is not bound by the stance of the respondents. What is of most importance is for the AG to independently assess the justice of the reliefs claimed pursuant to OS 1128. We do not think the AG is found wanting in this respect. By the consent granted, the AG spared no effort in getting to the bottom of what had happened in respect of the purported change in the nature of the trust. This is a valid option exercised by the AG in ensuring that the justice of the matter be determined by the court.

Whether The Trust Deed Of 31 July 2006 Could Override The Indenture Of 1845

[92] The trust deed of 31 July 2006 created for the present Burmese trust had the effect of turning completely the nature of the charitable religious trust established by the indenture of 1845. The salient terms of the trust deed as noted by our brother Lee Swee Seng JCA in the grounds of judgment for the appeal of OS 1128 are as follows:

> (1) The said Burmese Trust Property will be known as the Penang Burmese Trust Property.
>
> (2) The expression "The Penang Burmese Trust Property" appearing in this trust deed will mean the above-mentioned Burmese Trust Property and hereby granted together with all other moveable and immovable properties and other rights received or acquired by or allocated to the Burmese Community in Penang and the Penang Burmese Trustees by way of donations or gifts or purchase or other mode of acquisition or joint venture activities and all articles and things offered to or otherwise received or recovered.
>
> (3) The Penang Burmese Trustees shall, out of the gross income from the Penang Burmese Trust Property and Burmese Trust Fund pay all the liabilities, taxes, other levies payable to the Government or other local authorities and all other outgoings for the repair and managing of the Penang Burmese Trust Property including the salaries or wages payable to the servants and other employees employed by the Penang Burmese Trustees for the management of the Penang Burmese Trust Property and otherwise authorised by this trust deed or in law.
>
> (4) Any moneys received by the Penang Burmese Trustees on any account shall be credited into an account or accounts opened by the Penang Burmese Trustees in one or more Banks or Financial Institutions. All expenses to be incurred will be made by drawing money by a cheque or cheques from one or the other Bank Accounts.
>
> (5) The Penang Burmese Trustees shall have power to engage the services of architects, chartered accountants, lawyers and other professionals for consultations, advice or attending to any work in connection with or in the course of administration of this trust deed from time to time and to pay their fees and other charges out of the income of the Penang Burmese Trust Property and the Burmese Trust Fund.
>
> (6) a. The Penang Burmese Trustees shall be entitled to carry out repairs, renovations, additions and/or improvement to the Penang Burmese Trust Property from time to time, and meet the expenses therefore out of the *corpus* of the Burmese Trust Funds.
>
> b. Subject to Clause 7 herein below mentioned, the Penang Burmese Trustees shall have no power to sell the Penang Burmese Trust Property or any part thereof or mortgage the same, or to create a charge to any thirty party thereon. The Penang Burmese Trustees, however, will have the power to purchase or otherwise acquire any

immovable property including landed and non-landed or other premises in a Co-operative Housing Society or an apartment ownership if it is in the interest and benefit of the Burmese Community in Penang, but not otherwise.

(7) *The Penang Burmese Trustees shall have the power to enter into a joint venture agreement and/or transaction with any such future, potential Developer and/or Contractor to develop and/or construct and/or build on the Penang Burmese Trust Property upon such terms and conditions as the Penang Burmese Trustees shall deem fit and proper and for the best interest and future benefit of the Burmese Community in Penang. The Penang Burmese Trustees shall only permit the said Developer and/or Contractor to cause to sell and/or charge or encumber any or all Units of Property allocated and/or belonging to the said Developer and/or Contractor only as a result of the said joint venture to such banks or financial institutions or parties solely for purpose of end-financing in respect of loans to be obtained by such end-purchasers of any or all such Units of Property belonging or allocated to the Developer and/or Contractor under the joint venture.*

(8) The Penang Burmese Trustees shall also have power to lease, let, rent, manage, enter into tenancy any such property purchased or otherwise acquired and/or allocated as a result from any such joint venture agreement transaction with regards to the Penang Burmese Trust Property for the best interest and future benefit of the members of the Burmese Community in Penang which the Penang Burmese Trustees shall deem fit and proper to do.

(9) The Penang Burmese Trustees shall keep the Penang Burmese Trust Property as well as all other immovable property and valuable movable property of the Burmese Community in Penang insured for a reasonable amount against fire, theft and other accidents as they shall think fit and shall keep the insurance policy alive at all time.

(10) The Penang Burmese Trustees will have the power to accept any donation of any property moveable or immoveable or moneys or securities provided such donation is not onerous or against the law of Malaysia and the interest of the Burmese Community in Penang and the conditions if any imposed are not inconsistent with the provisions of the Trust or contrary to the main object of this trust deed. The Penang Burmese Trustees will also have the power to disburse funds for the purposes of donations to the public or charitable organizations in particular to the members of Burmese Community in Penang and the Buddhist Temples. The Penang Burmese Trustees will also have the power to manage funds such as government bonds, securities, unit trusts and fixed deposits for the best interest and future benefits of the members of the Burmese Community in Penang.

(11) Any of the powers and/or authority by this Trust Deed given to or vested in the Penang Burmese Trustees may at any time, when there is more than one Trustee, be exercised by a majority of the Trustees and without the concurrence, or with merely a formal concurrence of any Trustee who by reason of illness, infirmity or otherwise may be unable, without inconvenience, to take an active part therein and such Trustee

A may in order to facilitate business, by power of attorney or to otherwise, empower any of the other Trustees to use his or her name for execution or signature of document or for any of the purposes of this Trust without being responsible for loss and all the acts and proceedings of the majority of the Trustees shall in such case be valid and effectual as if they had all concurred therein.

B

All acts, proceedings and exercise of discretion of the majority of the Trustees shall be absolutely binding on the remainder of the Trustees.

(emphasis added)

[93] In this regard, there is basis to inquire whether the present Burmese C trustees could have breached the terms of the indenture of 1845 by transferring part of the trust property to the first respondent by allotting Lot 10029 to Five Star Heritage Sdn Bhd, first respondent without obtaining the consent of the AG pursuant to s. 9 of the GPA. Thus, the AG's consent for Nai and Ho to pursue OS 1128 is a fair decision in seeking to understand how a public religious trust had turned to a private trust.

D

Whether Public Charitable Trust Could Stand The Test Of Time

[94] Compared to private trust, public charitable trust and its purpose could last for generations far beyond its initial establishment. In the present case, though the trust was first established in 1845 for religious purpose, that E purpose could still be validly maintained to this date. In the words of our brother Lee Swee Seng JCA for the appeal of OS 1128:

> The beauty of a public charitable trust is that the rule against perpetuity does not apply to it and it may well survive the reckless authority of time. The passage of time cannot generally thwart its public charitable purpose F for so long as its charitable purpose is still relevant and not spent. Here it is for the advancement of religion of the Thai and Burmese community in Penang.

Whether The Public Charitable Trust Had Been Converted Into A Private Trust

G

[95] Nai had discovered that in respect of Lot 2103 for Burmese trust property, court declaration had been requested that the JVA dated 25 August 2006 between the trustees of the descendants of the Burmese in Penang and the Airmas Development Sdn Bhd is valid. However, the AG's consent was not obtained for this and this fact was not denied. Therefore, the HC was H without authority and jurisdiction to make the order dated 31 October 2007.

[96] The public charitable trust for religious purpose for the Burmese community could not have changed to a private trust under this circumstance. The circuitous manner upon which the public trust had been vested for the first respondent and the present Burmese trustees as private I trusts should not go unnoticed by this court in the present appeal. In this regard, for the appeal of OS 1128 we had also unanimously agreed on the following as explained by our brother Lee Swee Seng JCA:

It cannot be over-stated that from the very beginning, at the inception, the trust is a public charitable trust over the subject matter of the original Trust Land. It is thus a mystery how a public charitable trust can be converted to a private trust without any application being made to the High Court with the written consent of the AG to amend, alter or vary the Indenture of Trust of 30 May 1845.

[97] Our brother went on to clearly note the suspicious nature of the futile attempt to change the public trust to a private trust as follows:

The indenture of Trust created a public charitable trust for the benefit of the Burmese and Thai communities in Penang with no power to, among others, sell, transfer, or otherwise alienate the land and it was to remain and continue for the benefit for the benefit of such communities. This was highlighted at para [21] of the Federal Court case of *Peguam Negara Malaysia v. Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) And Another Appeal* [2019] 4 CLJ 561; [2019] 3 MLJ 443 as follows:

> The dispute herein revolves around a piece of land formerly known as Lot No. 2103 held under Geran No. 61390 ("Lot No. 2103"). Lot No. 2103 was originally part of a land known as Lot No. 104, Section 4, Georgetown, North East District, Penang held under Geran (First Grade) No. 6719 ("Lot No. 104"). Lot No. 104 with a temple erected thereon was the subject matter of a religious and charitable trust created by the East India Company on behalf of Queen Victoria on 30 May 1845 for the benefit of the Burmese and Thai communities in Penang, **with no power to *inter alia*, sell, transfer or otherwise alienate the land and it was to remain and continue for the benefit of such communities** ("the Burmese-Thai Trust").

The trustees cannot arrogate to themselves the power to convert the public charitable trust into a private trust by entering into a trust deed with respect to their powers when applying to have their names registered as the new Trustees with power to enter into a joint venture agreement with a third party and to transfer the land to another third party, in this case, Five Star, for the purpose for the joint venture without the written consent of the AG. No public charitable trust would be safe if trustees can unilaterally make such a decision be reference to some actions taken before which has the imprimatur of the Court. (emphasis added)

Whether It Is Relevant To Note That The Land Had Been Rezoned For Commercial

[98] On this issue, in the appeal of OS 1128 we found as explained by our brother Lee Swee Seng JCA as follows:

The fact that part of the Burmese portion of the land had been rezoned for commercial use does not change the character of the public charitable trust for the advancement of religion. The planning authority rezoning of land use cannot be used as a reason for arguing that the public charitable trust had failed.

A **Whether Separate Management And Administration For The Initial Trust Meant That The Public Religious Trust Had Turned To A Private Trust**

[99] As explained, the initial public religious trust for the Thai and Burmese communities were later separated for the two communities resulting in the partitioning of Lot 104 into Lots 2102 and 2103. This is for pure administrative purpose and should not have affected the nature of the public trust and did not turn the same to a private trust. This is already explained in similar fashion by our learned brother, Lee Swee Seng JCA for the appeal of OS 1128 in the written grounds as follows:

> A separate administration and management of the original Trust Land before the partition and subdivision into the Thai and the Burmese portion and the separate administration of the funds collected cannot in the circumstances of this case convert the public charitable trust into a private trust. Separate administration of the Trust Fund has no nexus whatsoever to converting the public charitable trust into a private trust. This is the stand too of the SFC appearing on behalf of the learned AG and we are in complete agreement with him.
>
> The separate administration was necessary as the donations had come from the devotees of the Thai temple and with no donations collected for the Burmese community as there was no Burmese temple constructed, one can foresee the simmering discontent boiling over for a continuing sharing of the Funds.
>
> Likewise, the written consent of the AG of 1.6.2000 agreeing to named persons to be appointing trustees of the Thai Trust and Burmese Trust and for separate administration and division of the Funds cannot be interpreted to mean that the AG had agreed to the Burmese portion of the Trust to be terminated or converted into a private trust.

Conclusion

[100] We respectfully do not agree with the contention of the respondents that the AG had wrongly given his consent to Nai and Ho in respect of OS 1128. The AG did not act in a partisan way and gave his consent with the primary aim of ascertaining the truth whether it was truly the case that a public religious trust had turned to be a private trust in this case. We see no reason too to say the AG acted beyond his power to grant the consent.

[101] Based on all the reasons we have given, the JR should not have been allowed for the respondents by the HC. Therefore, we are unanimous in allowing the appeals and setting aside the order of the HC. As this is a matter of public interest, we make no order as to cost.